

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 November 2015

Case Number: 2014-FRS-00067

In the Matter of

CHRISTOPHER HART
Complainant

v.

GRAND TRUNK WESTERN RAILROAD CO.
Respondent

Appearances:

Robert B. Thompson, Esq.
Harrington, Thompson, Acker & Harrington
Chicago, Illinois
For the Complainant

Noah G. Lipshultz, Esq.
Little Mendelson, P.C.
Minneapolis, Minnesota
For the Respondent

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRS” and “Act”), Title 49 U.S.C. § 20109, as amended, and as implemented by 29 C.F.R. Part 1982. Jurisdiction for this case is vested in the Office of Administrative Law Judges (“OALJ”) by this statute, under subsection 20109(d)(2)(a), which applies the rules and procedures set forth in 49 U.S.C. § 42121 (b) relating to whistleblower complaints under the Aviation Investment and Reform Act for the 21st Century (“AIR 21”).

Section 20109(a) of the Act prohibits a railroad carrier, a contractor or subcontractor of a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting,

suspending, reprimanding, or in any other way discriminating against an employee because (s)he: a) provided information regarding any conduct the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety, or security, or gross fraud, waste, and abuse of federal grants or other public funds intended to be used for railroad safety or security, if the information is provided, to a federal, state, or local regulatory or law enforcement agency; any member of Congress; or person with supervisory authority over the employee; or a person with authority to investigate, discover, or terminate the misconduct; b) refused to violate any federal law, rule, or regulation regarding railroad safety or security; c) filed a complaint related to the enforcement of provisions of the Act; d) notified the railroad carrier or the Secretary of Labor of a work-related personal injury or work-related illness of an employee; e) cooperated with a safety or security investigation relating to any accident or incident resulting in an injury or death to an individual or damage to property occurring in connection with railroad transportation; and f) accurately reported hours on duty pursuant to 49 U.S.C. Chapter 211.

Additionally, Section 20109(b) prohibits a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because (s)he: a) reported in good faith a hazardous safety or security condition; b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures unless the condition is corrected immediately, or the equipment, track, or structures are repaired properly or replaced; and c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions just discussed above.

Finally, Section 20109(c) of the act prohibits a railroad carrier, or an officer or employee of a railroad carrier from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the order or treatment plan of a treating physician, except a railroad carrier's refusal to permit an employee's return to work following medical treatment shall not be considered a violation of the Act if the refusal is pursuant to the Federal Rail Administration medical standards, or the carrier's medical standards for fitness for duty.

Procedural History

Christopher Hart ("Complainant") has been employed as a brakeman and conductor for Grand Trunk Western Railroad ("Respondent" or "GTW") since 2004. Respondent took Complainant out of service on November 15, 2012, citing efficiency test failures, and lifted the suspension 26 days later on December 10, 2012.¹ (CX 3). Thereafter, Complainant filed a

¹ Complainant appealed the suspension pursuant to the terms of his collective bargaining agreement. While the appeal was pending, the parties reached an agreement to reduce the suspension to 10 days lost time. (CX 15).

complaint with the Secretary of Labor on May 9, 2013, alleging Respondent violated the Act by suspending him, not for efficiency test failures, but for reporting, in writing, a safety hazard on or about October 11, 2012.² Following an investigation, the Secretary, acting through his agent, the Area Director for the Occupational Safety and Health Administration (OSHA), dismissed the complaint on March 10, 2014, finding the evidence “failed to establish that Complainant had engaged in any protected activity or that Respondent had been made aware of any protected activity by Complainant.” (ALJX 1)

Complainant timely appealed to the Office of Administrative Law Judges (“OALJ”) (ALJX 2) and the case was assigned to the undersigned on March 27, 2014. After one continuance (ALJX 4), a *de novo* formal hearing was held in Detroit, Michigan on October 15-16, 2014. All parties were present and the following exhibits were received into evidence: Administrative Law Judge Exhibits (“ALJX”) 1-7 (Tr. 5); Complainant’s Exhibits (“CX”) 1-11(a), 13, 15-17 and 19-20 (Tr. 26) and Respondent’s Exhibits (“RX”) 1-10 (Tr. 28). Six witnesses, including Complainant, testified at the hearing.

The parties were granted leave to file post-hearing briefs. Complainant and Respondent filed their respective briefs on February 13 and 17, 2015, and reply briefs on February 24 and 25, 2015. The parties’ briefs and the testimonial and documentary evidence submitted at trial were considered in rendering this decision.

Positions of the Parties

Complainant. Complainant filed a Safety Hazard Reporting Form on October 11, 2012 complaining about tall weeds causing unsafe ground conditions on the north side of the Battle Creek, Michigan fuel dock. (CX 4). Complainant filed the form after unsuccessfully trying to get the safety issue resolved informally. Because Complainant filed the written safety report, something Respondent does not favor, Respondent targeted him for discipline and subsequently pulled him from service on November 15, 2012 for allegedly failing efficiency testing. There was absolutely no factual basis to pull Complainant from service as he violated no company rules. However, after a formal investigation on December 3, 2012, Complainant was assessed a 26-day suspension, later reduced to 10 days. The evidence establishes that “Complainant’s filing of a Safety Hazard report on October 11, 2012 was a contributory factor to Respondent’s decision to pull [him] from service on November 15, 2012 and to suspend him from work.” *Complainant’s Post Hearing Brief*, dated February 13, 2015 at 4. Complainant now seeks \$2,500.00 for lost wages; compensation for emotional distress and other compensatory damages in the amount of \$5,000.00; removal of the suspension from all personnel records; \$20,000.00 in punitive damages; and reasonable attorney’s fees and costs. *Complainant’s Post Hearing Brief*, at pages 31-32.

Respondent. Complainant’s suspension could not be in retaliation for submitting a safety hazard reporting form on October 11, 2012 because no one involved in the decision removing him from service or suspending him for the various efficiency test failures on November 14-15, 2012 was

² Complainant filed a written Safety Hazard Form alleging Respondent’s “repeated failure to respond to numerous complaints about unsafe ground conditions on the north side of fuel dock at Respondent’s railroad year in Battle Creek, Michigan.” (*Complainant’s Post Hearing Brief*, dated February 13, 2015, at 1, 2; CX 4).

aware of the October report. As such, Complainant cannot prove that submission of the safety report on October 11, 2012 was a contributing factor to his suspension; in other words, Complainant cannot establish a connection between the protected activity of reporting a hazardous safety condition and the discipline imposed. Regardless, even if Complainant can establish such a nexus, GTW would have taken the same action, regardless of the protected activity, as evidenced by GTW imposing the same discipline on one of the two other crew members operating on November 14-15, 2012. Finally, even if he prevails, Complainant is not entitled to back pay as he received insurance payments covering his entire wages during the suspension; has presented no evidence he has suffered any emotional distress specifically related to this claim and he is not entitled to punitive damages. *Post-Hearing Brief of Respondent Grand Trunk Railroad*, dated February 17, 2015, at pages 16-28.

APPLICABLE LAW

The FRSA, under which Mr. Hart brings his claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109.

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” to the respondent taking an adverse employment action against him. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant’s protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,³ and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under the FRSA, Mr. Hart must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) Grand Truck Western Railroad knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable

³ An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

personnel action.⁴ See *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).⁵ The regulations governing cases brought under the FRSA are found at 29 C.F.R. Part 1982, and incorporate the General Rules of Practice and Procedure before the OALJ, which are found at 29 C.F.R. Part 18.

Issues

Did Complaint engage in a protected activity on or about October 11, 2012 when he made a written report of a hazardous safety condition?

If so, has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent’s decision to suspend him, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision?

If so, has Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity?

If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

Joint Stipulations

The parties, by their joint oral stipulation, agree to the following undisputed facts

Complainant and Respondent are covered Employee and Employer under the Act and Complainant suffered an adverse action under the Act when he was taken out of service on November 15, 2012 and subsequently suspended on December 12, 2012. (Tr. 5-6).

⁴ Although I list the knowledge requirement as a separate element, I note the ARB has reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. See *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

⁵ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed.Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit); see also *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (“A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive.”); *Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011), at 31-32; *Kuduk v. BNSF Railway Company*, 768 F. 3d 786 (8th Cir. Oct. 7, 2014)(“[a] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

Summary of Testimony⁶

Christopher Paul Hart (Tr. 29-128)

I am 43 years old, married, and a father to a six-year-old boy. My home terminal is Port Huron, Michigan. (Tr. 30.) It is about 110 miles from Freeland, where I live, to Port Huron. I was first hired as a brakeman for GTW in October 2004 and was later promoted to a conductor position. Most jobs have two crewmembers: an engineer and a conductor. Some yard jobs have three crewmembers, with the third being a brakeman. Seniority determines who the conductor is and who the brakeman is on a particular job. On November 15, 2012, I was the brakeman on a three-man crew. (Tr. 31.) The conductor was Mr. Carrier and the engineer was Mr. Pinkett.

A “switching” move is when cars are taken from one track and moved to another or when cars are placed in a specific track. A “switch” is a hand-operated device that allows you to go from one track to another. A “handbrake” is on one end of the car and used to manually apply the brakes on one set of wheels. CX 19 is a picture of the kind of locomotive I was working on the night of October 14, 2012. The engineer works in the locomotive and can operate the airbrakes independently. He cannot typically apply a handbrake. (Tr. 34.) CX 19(a) is a picture of a gondola. The handbrake is in the middle that looks like a wheel. CX 20 is a picture of two cars coupled together. You can see the hoses, but not the airbrake system. (Tr. 38.)

Crewmembers communicate signals and direction by radio and by hand. (Tr. 39.) We do have company rules governing what crewmembers say to each other over the radio. (Tr. 42.) I complied with these rules on November 14 and 15, 2012.

I became an officer in the union in 2010, first as a legislative representative and later a local chairman. (Tr. 43-44). As local chairman, I am steward for the terminal.

Prior to October 2012, I had made safety complaints, but none in writing. (Tr. 44.) I did have conversations prior to October 2012 with supervisors about safety complaints. They preferred that complaints be made orally. (Tr. 45.) I filled out a Safety Hazard Reporting Form on October 11, 2012. CX 4 is a copy of what I faxed. CX 4(a) confirms the fax was transmitted. I sent the fax from Battle Creek, and it says that “I have talked to several people concerning tall weeds at the north side of the fuel dock.” (Tr. 46.) Those people were Trainmaster Black, Trainmaster Jacob Hummerding and a couple people from the Battle Creek safety team. (Tr. 47.) The fax says that the weeds are 2-3 feet tall and only 2 feet away from incoming crews where they detrain, and that nothing had been done since I had raised the issue. I was trying to communicate a safety complaint. Other people have told me they were concerned about making complaints for fear they would be targeted for discipline. (Tr. 49).

My home terminal in October and November 2012 was Port Huron, where Assistant Superintendent Pete Bistis was in charge. I had a conversation with him after filing the report on October 11, 2012 and before the events of November 14 and 15, 2012. (Tr. 50.) I don’t remember the specific date that I spoke with Mr. Bistis, but I think it was probably two or three

⁶ The summary of the hearing testimony is not intended to be a verbatim transcript but merely to highlight certain relevant portions.

weeks after I filed the report. To the best of my recollection, I went in and asked him why I couldn't get it resolved. He sighed and said he would look into it. But nothing got done. Other than saying "I'm looking into it," there was nothing indicating he was aware of my prior written complaint. (Tr. 51.) I repeatedly talked to trainmasters at Port Huron, all under Mr. Bistis's supervision, who would listen to me about the weeds. (Tr. 51-53.) I was just trying to get it fixed.

On November 14, 2012, I was called off the spare board, which is a board of extra men that cover assignments when there is a vacancy, and assigned to the L561. The L561 services Cargo Flo and Nolan Distribution, among other industries. I remember switching at Cargo Flo the evening of November 14, 2012. I was responsible for tracks 1, 2, and 3. CX 7-10 are aerial photographs of Cargo Flo and show the layout of the tracks. I did not violate any safety or operating rules that evening. (Tr. 59.)

RX 1 is a transcript of the investigation of my behavior on the evening of November 14. The investigation resulted from my alleged failure to test the handbrake in track 3 at 22:41 hours. (Tr. 60.) I was also investigated for allegedly violating the rule relating to stretching at 22:45 and the rule regarding proper operation of D-rails. (Tr. 61-62.) I did not operate D-rails on the evening of November 14. (Tr. 62.) I also properly stretched the cars. (Tr. 74.)

At some point during the evening of November 14, Mr. Herbeck asked me for my operating bulletins, conductor card, and hazmat card. (Tr. 77.) I had all of them. I had been efficiency-tested previously, and I was required to have these items in my possession. Mr. Carrier and Mr. Pinkett were also asked for these items. There was some discussion of efficiency test failures and rule violations on the parts of Mr. Carrier and Mr. Pinkett, but no one mentioned my having violated any rules. (Tr. 78-79.) They just told us to sit tight and they left. When they came back, they said the whole crew is out of service. (Tr. 79.) I was shocked. At that point, I didn't even know any rules I had violated. I asked [Assistant Superintendent] Ormond. He did not tell me, and instead just said that the whole crew is out of service. By then, it was the early morning hours of November 15, 2012. The investigation notice I subsequently got, dated November 15, 2012, also did not specifically tell me what rules I had allegedly violated. (Tr. 80; RX 1.) I later found out I was being investigated for failing to stretch a joint and failing to test a handbrake. I have never heard of anyone being pulled out of service for that. (Tr. 81.) In my experience, not every efficiency test failure results in an investigation. I have looked at my prior efficiency tests. (CX 16.) The last time I was notified of an efficiency test failure was in September 2007, at which time I was not pulled out of service. There was no investigation. I have complied with all efficiency tests since then up until November 15.

I eventually received 26 unpaid days off for failing the November 14th efficiency test, but this was later reduced to 10 days. (Tr. 84.) I estimate that I lost about \$2,500.00 in wages. (Tr. 86.) Being pulled out of service emotionally affected me and my family. (Tr. 84-86.) My wife was distressed. It was Christmas-time and she was confused why I was being pulled out for so long. I couldn't give her an answer. I eventually got the discipline letter, and when Mr. Ormond told us we were being pulled out of service, he said he had talked to Mr. Bistis. (Tr. 87.) Except for a letter of reprimand in 2005, I have not been previously disciplined. I had never been pulled out of service before this event. I am asking for compensation for what my family and I went through for being held out of service.

I agree that Grand Trunk Western's operating rules require employees to bring unsafe conditions to the railroad's attention. (Tr. 88). There are different ways to bring safety concerns to the attention of management. One way would be a conversation, others would be talking to my safety committee representative, emailing a member of management or submitting a safety hazard reporting form. (Tr. 89-90). Prior to November 14, 2012, I had raised a safety concern in 2011 to Mr. Bistis about where employees had to walk in an area in downtown Detroit. He addressed this issue to my satisfaction. Other than the safety concerns with Mr. Bistis in 2011 and the safety hazard form in October 2012, I don't recall raising any other safety issues prior to the November 14, 2012 efficiency testing. (Tr. 92.) I also do not recall bringing any safety concerns to the attention of Lance Osmond, Eric Herbeck or Derrick Colasimone prior to November 14. Mr. Bistis never made any negative comments to me about raising safety concerns. In fact, nobody from management has ever made a negative comment to me about raising safety concerns.

I faxed CX 4, the safety hazard reporting form, to the fax number indicated at the bottom of the exhibit, which was to the Battle Creek trainmasters. (Tr. 93). I do not know what happened to it after I faxed it. I don't know who even saw the form, if anyone. I raised the same issue that I talked about in the form with Mr. Bistis, though I don't remember exactly when I had the conversation. (Tr. 94-96.) I did say in my deposition that I was not sure when, but I also said that it was a couple of weeks after submitting the form.

After the 26-day suspension in December 2012, I raised additional safety concerns both verbally and in writing to Mr. Bistis, including a lighting issue and an issue regarding the reception in the handheld radios. (Tr. 97). I continued to raise concerns about walking conditions, switches being tough to throw, and crew change points. I also recently raised a complaint to Mr. Osmond about an unsafe transport driver, who was subsequently pulled from service. I don't believe that the reason I was efficiency tested was because I had submitted a safety hazard reporting form. (Tr. 98.) I do believe the reason I was disciplined on December 12, 2012 was because I submitted a safety hazard reporting form. I also believe the reason I was pulled from service on November 15, 2012 was because of the safety hazard form. No one has ever said or implied that the safety hazard form is the reason that I was disciplined. (Tr. 99).

Efficiency testing is a mandated program by the Federal Railroad Administration. (Tr. 99.) It is often done with employees unaware they are being observed. There was nothing unusual with the fact I was unaware of Mr. Herbeck and Mr. Osmond's presence on November 14 and 15, 2012. (Tr. 100.) The night of November 14 when I worked L561 was not my regular assignment. Mr. Carrier and Mr. Pinkett were not my regular crew. (Tr. 101.) It is normal procedure for notices of investigation not to state the specific rule violations. (Tr. 113). The union objects to this practice, but the fact that my notice of investigation did not state a specific rule is not different or unusual from a typical notice of investigation.

At my deposition, I stated that the emotional distress over this incident was related to the uncertainty of not knowing the outcome, and not knowing what was going to happen when I was out of service. (Tr. 115.) Once I had some finality and closure, the emotional distress abated

somewhat. I have not exhibited any physical symptoms relating to my emotional distress; I have seen a doctor, and I sleep normally. (Tr. 116).

I have not been disciplined since my suspension and I have passed three efficiency tests. (Tr. 118). My 26-day suspension was later reduced to 10 days. (Tr. 119.) I was reimbursed for 16 days. At the time, I had job insurance covering the period I was out of work and not getting paid. (Tr. 121.) I was paid \$135 per day for all 26 days I was out of work. I never returned any of the money once I received the 16 days' worth of back pay from the railroad. I paid all the premiums for the insurance plan. It was about \$47 month and I have paid since I have been on the railroad. I have paid far more than I ever collected from the fund. (Tr. 122.) According to the fund, I did not have to pay them back under the terms of the policy.

I first believed I was being retaliated against for the October 11, 2012 safety complaint sometime between November 15, 2012 and December 12, 2012. (Tr. 126.) I did not raise the safety complaint or mention it at all during the investigation. (Tr. 127.) I told Mr. Bistis, Jacob Hummerding and Trainmaster Black about the safety hazard form before November 15, 2012. I did not tell anyone about the form from November 15, 2012 to December 12, 2012.

Eric Herbeck (Tr. 129-212).

I have been employed by Grand Trunk Western Railroad since 2005. (Tr. 129.) In November 2012, I was the trainmaster assigned to Pontiac, Flint, and Detroit. (Tr. 130.) I was promoted to division trainmaster in December 2012. I participate in daily teleconferences with various supervisors as part of my duties. (Tr. 131.) General managers and assistant superintendents, like Mr. Colasimone and Mr. Bistis, also participate in these calls. We discuss operational matters on these calls, but not safety matters. (Tr. 132.) There is a separate weekly call for the discussion of safety of operations.

When I receive verbal safety complaints, I identify what it would take to correct the unsafe condition and address it immediately. (Tr. 137.) I do not expect an employee to perform duties in unsafe conditions, and it would reflect negatively on my career if I did not act upon a safety complaint. Efficiency tests are performed by a field supervisor, who observes train crews performing their duties in the field and ensures they are complying with the rules. (Tr. 138.) When I perform efficiency tests, I document the tests in the PMRC system, which records the test. (Tr. 139.) I have a minimum number of 35 efficiency tests per month that I have to perform, but there is no maximum number. (Tr. 140.) When I went to Cargo Flo on November 14, 2012, I did not know how many efficiency tests I had already done that month. RX 16 is Mr. Hart's PMRC record. (Tr. 143; RX 16.) We were not specifically performing efficiency tests on Mr. Hart, but we were testing the L561 assignment that night. (Tr. 146.) Mr. Hart just happened to be assigned to that assignment.

CX 17 is the Manual Guidelines for Efficiency Testing, which is a reference guide for management employees who perform efficiency tests. (Tr. 148.) There are different types of efficiency tests for coupling and uncoupling cars, operating switches, peer to peer communication, possession of engineer or conductor certificates, and possession of rulebook and

timetables. (Tr. 149). There are also efficiency tests for radio communications, securing equipment left unattended, working between equipment, operating handbrakes, and personal protective equipment. (Tr. 150.)

I do not recall making a record of whether Mr. Hart complied with the rules for coupling and uncoupling, for operating switches, or for having constant peer to peer communication on November 14. (Tr. 150.) Mr. Hart had his rulebook and timetable, but I do not recall recording compliance for that efficiency test. (Tr. 152.)

Mr. Hart's efficiency testing on November 14 and 15, 2012 records three failures or non-compliant tests: one at 22:41, one at 22:47, and a third at 23:15. (Tr. 153-154; CX 16.) I did cite Mr. Hart for failing to communicate peer to peer about a D-rail. (Tr. 154.) If Mr. Hart had indicated that they discussed the position of the D-rails when they came in, that might indicate that he had satisfactory peer to peer communication. (Tr. 159.) I did not hear any peer to peer communication about the D-rails that night. (Tr. 160.)

In the course of observing Mr. Hart that evening, I never found any efficiency test failure for throwing switches or for being in constant radio communication. (Tr. 161.) I charged Mr. Carrier and Mr. Pinkett with failure to do a roll-by. Failing to do a roll-by is a serious matter, and Mr. Hart actually did perform a roll-by. (Tr. 162.) I had a conversation with Mr. Hart about him performing a roll-by, but I did not record it on the PMRC. (Tr. 163-164.) I don't know the number of switching moves Mr. Hart made before 22:41. (Tr. 165.) I don't recall seeing Mr. Hart at 22:45, the time of the stretching of the handbrake. (Tr. 171.)

I testified at my deposition that I don't recall anybody ever being pulled out of service for failing to test a handbrake or failing to stretch a joint, as Mr. Hart allegedly failed to do. (Tr. 173.)

I boarded the locomotive with Mr. Osmond, who at that time made a call to Mr. Bistis. (Tr. 174.) I did not hear Mr. Osmond make any recommendations to Mr. Bistis regarding discipline. (Tr. 175.) Neither Mr. Osmond nor I took part in the decision to pull Mr. Hart out of service.

Prior to becoming a manager in 2012, I spent five years as a conductor. (Tr. 177.) As a conductor, I had performed switching duties at Cargo Flo and Nolan Distribution. One of my responsibilities as a manager is to provide a safe working environment for employees. (Tr. 178.) I also handle safety concerns raised by employees. (Tr. 179.) One example of a safety concern that I handled was a customer property that was overgrown with weeds. I handled this concern by going to the location, inspecting the conditions, determining what corrective action was necessary, and determining whether the customer or the carrier would be responsible for that portion of the track. Once that is determined, if action to correct the problem cannot be immediately made, then we remove the location out of service and do not ask any employees to provide service there. (Tr. 179-80).

I consider it important for employees to bring unsafe conditions to the attention of management. (Tr. 182.) There is a lot of railroad track out there and hundreds of customers.

There are different avenues to let us know. Employees can report concerns to the yardmaster over the radio. (Tr. 183.) They can also work through the union representative who could then communicate a concern to a manager, or send an email. There is also a safety hotline. I have never told any employees that they should not raise safety concerns or not put safety complaints in writing. If I become aware of a legitimate safety complaint, I try and resolve it as promptly as possible. (Tr. 184.)

Mr. Osmond and I observed Mr. Hart and the other members of the crew on November 14, 2012 for several hours. (Tr. 186.) I've performed other efficiency tests that lasted that long. It is based off of workload and location. My practice is not to record every efficiency test passed, but I do record every failure. That is my practice no matter who the crew is or what the assignment is. I saw Mr. Pinkett and Mr. Carrier comply with efficiency tests and I did not record those as passing. (Tr. 187.)

On November 14, 2012, Mr. Osmond and I decided to conduct efficiency tests on the Mount Clements subdivision. (Tr. 189.) We looked at the different assignments that were on duty that night on the computer and what they had to perform and decided to perform efficiency tests on assignment L561 based off of workload and location being off property. When we made the decision to test that assignment, we did not know which crew was working. (Tr. 190.) It would have made no difference. I was not looking to test Mr. Hart. EX 31-33 are documents reflecting what we deemed to be rule violations that night.

The first time I ever met Mr. Hart and Mr. Carrier was November 14, 2012. I was not aware that Mr. Hart had filled out and faxed in a safety hazard reporting form. (Tr. 201.) I was not aware that Mr. Hart had ever raised a safety concern prior to efficiency testing on November 14, 2012.

Lance Osmond (Tr. 213-289)

I have been employed by Grand Trunk Western since January 1998. (Tr. 213.) I was a conductor for 4 or 5 years. In November 2012, I was a division trainmaster. (Tr. 214.) As a division trainmaster, I was responsible for the territories covering Flint, Pontiac, Detroit, and everything in between. I became an assistant Superintendent in December 2012. I recorded the efficiency tests for Chris Hart on November 14 and 15, 2012. (Tr. 215.) I did not record any passes or compliances with efficiency tests, even though Mr. Hart did comply. I didn't do anything different with the testing of the L561 crew that evening that I've have with any previous years of doing PMRC tests.

Not every efficiency test failure results in a formal investigation. (Tr. 247.) There are a number of reasons why an employee is pulled out of service, including fighting, drugs and alcohol, running red signals, handbrakes, working between equipment. Other employees have been pulled out of service for failure to stretch a joint or failure to test a handbrake. (Tr. 248.) Just recently I had an employee who was removed from service for not securing his tracks, not testing the handbrakes, and not stretching his joints when switching out a customer. I can't think

of specific instance of someone being pulled out of service for these violations before November 2012.

After the efficiency test, I called my supervisor, Pete Bistis. (Tr. 249-250.) I did not talk to Mr. Colasimone before the crew was pulled out of service. I did not make a recommendation to Bistis that the entire crew be pulled from service or that Mr. Hart be pulled from service; as a trainmaster, I do not have the authority to make that decision. (Tr. 250.) I only stated the facts of what we observed that night. (Tr. 251).

I have not received a complaint about or observed a safety hazard in terms of weed growth at the north end of the fuel dock in Battle Creek. (Tr. 253.) If I did, I would go out and look myself or ensure that someone looked and assessed how the safety hazard should be handled. It is absolutely ok for employees to bring a safety concern to my attention, even if I disagree that it is something that requires attention. (Tr. 254.) I handle safety concerns all the time. The method of reporting I prefer is email, which allows me to keep track and follow through. I also receive phone calls and text messages. I also have an open door policy and I empower employees to remove an unsafe condition from service. (Tr. 258.) I expect employees to raise safety concerns as they become aware of them and I have never told employees not to raise safety concerns to their supervisors. (Tr. 259.) I have never told employees they should not put safety complaints in writing; I actually prefer for complaints to be in writing.

I did not document every instance of compliance with the rules that occurred with Mr. Hart's activities on the evening of November 14, 2012 or Mr. Pinkett or Mr. Carrier. (Tr. 261.) That is the way I have always done efficiency testing. Four or five hours of efficiency testing is not uncommon. (Tr. 262.) When Mr. Herbeck and I decided to go testing, we did not specifically know who the crew was working on that job. (Tr. 263.) We were not looking to target Mr. Hart. I believed Mr. Hart had failed to test the effectiveness of a handbrake and communicate regarding the same and failed to stretch a coupling. (Tr. 266-267, 270.) When we told them, all crewmembers said they understood the rules that were violated and that all agreed they understood they were being entered in the PMRC as efficiency test failures. (Tr. 272.) After we told them that, Mr. Herbeck and I asked them to sit tight and we would be right back. We left to call Mr. Bistis and explained what we observed regarding assignment L561. (Tr. 274.) We told him we were observing the L561 crew working Cargo Flo and Nolan. We observed a roll by of 382 and explained the exceptions that were taken. We explained that we observed Mr. Carrier step on an operating lever to release a handbrake. (Tr. 275.) We stopped all movements immediately and just spoke to the crew. Bistis said he would call us back after giving Mr. Colasimone a call. At that time, Bistis did not instruct us to remove the crew from service. He called back later and said, "The whole crew is out of service," but he did not explain why.

Mr. Herbeck and I then informed the crew to tie down their train and that they were being relieved of their duties. Mr. Hart asked to speak to me outside and he asked, "Why do I need to be removed from service? The rules I violated weren't as bad as Nate [Pinkett] or Rich [Carrier]. I'm still safe enough. I can keep working." (Tr. 276.)

Prior to the efficiency testing on November 14, 2012, I was not aware that Mr. Hart had filled out and faxed in a safety hazard reporting form. I was not aware of Mr. Hart ever raising any safety concerns prior to November 14, 2012. Mr. Hart's submission of the form was never the subject of discussion prior to this litigation. (Tr. 277-278.)

At the December 3, 2012 disciplinary hearing, I did not mention that Mr. Hart had come up to me and said that he violated some rules, but that those violations were not as bad as the rules Mr. Pinkett or Mr. Carrier violated. (Tr. 279-280; RX 1 at 146).

The number at the bottom of the fax from Mr. Hart is the correct fax number for the Battle Creek trainmaster. (Tr. 288; CX 4). I was not a trainmaster in Battle Creek in October 2012. Prior to this litigation, I had never seen CX 4 before. (Tr. 289).

Thomas Klein (Tr. 290-303)

I retired on February 1, 2013 after working forty years for the Canadian National Railroad, which is also the Grand Trunk Western Railroad. (Tr. 290.) I was a trainman and conductor primarily out of Milwaukee Junction. (Tr. 291.) Complainant's attorney represented me in an FRSA whistleblower complaint and got my discipline removed. I was also paid for my lost time. I was the union local chairman for almost thirty-seven years. I represented employees in discipline and safety issues. I worked Cargo Flo many times. I represented Mr. Hart at his company investigation. (Tr. 295.) I have spoken with management with regard to written safety complaints. (Tr. 296.) The response I would get is they don't like things in writing. (Tr. 297). In my experience, when I've made written complaints, trainmasters and other officials were aware of these. I was told that when you fax a safety complaint using the fax number that it goes to everyone and that it is discussed on the morning conference. (Tr. 300). I do not know who may have seen CX 4. I have not participated in any management safety call so I do not personally know what is discussed. I also don't know if the identity of the employee who raises a safety concern is discussed at these meetings either. I don't know if Mr. Hart's safety complaint was ever discussed by any member of management on any management call. (Tr. 301).

Peter Paul Bistis, IV (Tr. 311-330)

I began my career with the railroad in 1993 as a diesel mechanic and I progressed to conductor, locomotive engineer, yardmaster, trainmaster, chief dispatcher, and then assistant superintendent. (Tr. 312.) I began my management career in 2004. In the fall of 2012, I was assistant superintendent responsible for the area from Sarnia, Ontario to Port Huron, Michigan. I did not have any responsibilities for Battle Creek. (Tr. 313.) The Battle Creek trainmasters did not report to me in the fall of 2012. I would not have had the occasion to access the Battle Creek trainmaster's fax machine in the fall of 2012. Employees would raise safety concerns to me all the time, including issues like lighting in the parking areas, the switching leads, anti-slip footwear, and signage in the yard. (Tr. 314.) I considered it important for employees to bring safety issues to my attention. Employees reported their concerns to both verbally and in writing.

I have never said to any employee that they should not raise safety concerns to my attention, or to not put safety concerns in writing. (Tr. 315.)

Prior to this litigation, I never saw CX 4. (Tr. 318.) Neither Trainmaster Black nor Trainmaster Hummerding worked for me at the time the form is dated. I did not discuss the form with them or anybody else. I did not discuss it with Mr. Hart. I never discussed it on a management conference call.

On the early morning hours of November 15, 2012, I got a call from Mr. Osmond regarding efficiency testing that he and Mr. Herbeck had been conducting. (Tr. 319.) I received the call at about three in the morning, and it woke me up. Mr. Osmond said he was watching a crew and rattled off six or seven failures. I don't remember what the failures were and whether it involved all of the employees, but Mr. Osmond wasn't discussing any one person. I told him I would call him back, but that we were going to pull them out of service. I made a phone call to my boss to let him know we were pulling them out of service and that the work wasn't going to get done. I called Mr. Osmond back and told him to proceed with pulling the crew out of service. In that phone call with Mr. Osmond, we were not parsing out who specifically violated what rule. (Tr. 320.) The decision and recommendation to Mr. Colasimone to pull the crew had nothing to do with Mr. Hart submitting a safety hazard reporting form. I did not have any involvement in the decision to ultimately discipline the crew members. When Mr. Hart returned to service after his suspension, he would regularly bring safety concerns or issues to my attention.

I have read the minutes of safety committee records from October, November and December 2012. (Tr. 322.) I do not recall any conversations with Mr. Hart in the fall of 2012 about Battle Creek and tall weeds. (Tr. 324.) I never saw the faxed complaint from Mr. Hart (CX 4). If he had brought up the issue of weeds, I would have called Battle Creek and let them know. (Tr. 325.)

I didn't make a determination of what Mr. Hart may have personally done on November 14-15, 2012. I believe they should have been pulled out of service as a crew. (Tr. 327.) Once an employee is pulled from service, a formal investigation will follow. It was my decision to pull the crew from service. (Tr. 328.) I let Mr. Colasimone know, but it was my decision. The testing officers, Mr. Herbeck and Mr. Osmond, did not make any recommendations as to what should happen to the crew. I believe Mr. Osmond did tell me the names of the three employees who would be pulled out of service. (Tr. 329).

Derrick Colasimone (Tr. 330-376)

I was the general manager of the Michigan Division in October/November 2012. (Tr. 330.) This is an extensive territory that employs about 1,100 people. As general manager, I had overall responsibility for the safe and efficient operation of the railroad in my area. (Tr. 332.) I participated in health and safety meetings and orchestrated safety summits. A safety summit is a meeting where we ask employees and managers from all the different departments to join us in an open forum. We bring anywhere from 15-100 employees together to discuss safety. (Tr. 333.) It is important for employees to bring safety concerns to the attention of management. (Tr.

334). I have never told employees not to raise safety concerns. I have never told employees not to raise written safety concerns. Prior to this litigation, I never saw CX 4. I had no knowledge of Mr. Hart completing the report or faxing it in. (Tr. 335).

In the early morning hours of November 15, 2012, I got a phone call regarding a crew that had been efficiency tested. At the time of my deposition, I did not remember who had made the call. I don't recall the gist of what was said, other than we had removed a crew from service. The decision to suspend them was mine to make. After they were removed from service, we did a formal investigation. The crew was held out of service pending the investigation so I could determine whether they could return to work and safely and efficiently operate. (Tr. 336.) Prior to issuing the discipline in this case to Mr. Hart, I read the transcript of the investigation. I reviewed Mr. Hart's efficiency tests and PMRC testing. I talked to the Superintendent to seek his thoughts and then I fall on my thirty-one years of railroading and use my gut to make a decision. (Tr. 339.) With respect to this investigation, I concluded that Mr. Hart's conduct was in violation of the rules he was charged with and I disciplined him accordingly. From the testimony and transcript and from the incident at hand, the seriousness of the incident warranted a severe amount of discipline.

RX 4 is an email with a list of test failures Mr. Herbeck sent to me, Mr. Bistis and Mr. Tassin. RX 2 is the letter sent to Mr. Hart as a result of the formal investigation. (Tr. 340.) RX 3 is the letter Mr. Pinkett received. Both letters are signed by Phillip Tassin. While I made the decision to discipline Mr. Hart and Mr. Pinkett, the letters went out under Mr. Tassin's name because it was his office and his letterhead. This is simply our procedure. We follow the same procedure in all disciplinary actions in the Michigan division.

I gave Mr. Hart and Mr. Pinkett a time-served suspension. (Tr. 346.) This means that he was considered suspended for the time we pulled the crew out of service, held the investigation, reviewed the transcript, and came to a decision. In this case, it took a little longer because of the delay to hold the hearing. I have given time served suspensions to employees other than Mr. Hart and Mr. Pinkett. I've disciplined other employees who violated the rules regarding testing handbrakes and stretching couplings. (Tr. 347.) My discipline of Mr. Hart had nothing to do with him filling out a safety hazard form. (Tr. 349.) I didn't know about any safety hazard form when I issued the suspension. I would have issued the same discipline to Mr. Hart regardless of whether he had filled out a safety hazard reporting form.

I knew that Mr. Hart had not been disciplined in any way since 2005. (Tr. 351-352.) I know that at my deposition I said that I didn't recall the specific individuals involved in the testing; that I was simply informed that two of my officers conducted an efficiency test on an entire crew who had violated various rules. (Tr. 355.) At the time of the deposition, I said that it was the opinion of the testing officers that the crew needed to be removed from service, and I supported that decision. I now realize that I did not remember those events properly. (Tr. 356.) I actually don't remember if Mr. Bistis, Mr. Herbeck, or Mr. Osmond was the one who originally recommended that the crew members be removed from service. (Tr. 359.) I also don't remember if it was Mr. Bistis or Mr. Herbeck on the phone. (Tr. 369.) It was just conveyed to me that there had been some efficiency test failures and I removed the crew from service.

Before this event, I did not know Mr. Hart. (Tr. 370.) Before I was deposed on September 30, 2014, I had not seen the safety hazard form Mr. Hart submitted and I was not aware he had made a safety complaint. (Tr. 374.) I validated Mr. Bistis's decision to remove the crew from service. (Tr. 373.)

Findings of Fact and Conclusions of Law

The FRSA provides, in relevant part, that an officer or employee of a railroad carrier engaged in interstate commerce shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting, in good faith, a hazardous safety or security condition. 49 U.S.C. § 20109(b)(1)(A). Complainant alleges Respondent violated the FRSA when he was taken out of service on November 15, 2012 and suspended on December 10, 2012 after filing a written Safety Hazard Reporting Form on October 11, 2012. This Form reported Complainant's concerns regarding tall weeds causing unsafe ground conditions on the north side of the Battle Creek yard. *Complainant's Post-Hearing Brief* at 1.

As noted above, actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, Mr. Hart must demonstrate⁷ that: (1) Grand Trunk Western Railroad is subject to the Act and he is a covered employee under the Act; (2) he engaged in protected activity, as statutorily defined;⁸ (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11 (ARB June 29, 2007).

The parties stipulate, and I find, that Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a) and that Complainant suffered an adverse employment action when he was removed from service on November 15, 2012 and suspended on December 10, 2012.⁹ I further find there is no genuine dispute that Complainant engaged in protected activity under 49 U.S.C. § 20109(b)(1)(A) when he faxed a Safety Hazard Reporting Form to the Battle Creek safety office on October 11, 2012 alleging that tall weeds near the North side of the Battle Creek fuel dock were affecting crew visibility. Therefore, the only remaining issue is whether there is a causal link between the protected activity and adverse action. Thus, this case basically requires me to answer a single question – at

⁷ The term "demonstrate," as used in AIR 21 and FRSA, means to prove by a "preponderance of the evidence." Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of Complainant's behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv).

⁸ By its terms, FRSA defines protected activities to include acts done "to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee."

⁹ *See Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988 SWD 2, slip op. at 20 (ARB Feb. 28, 2003) (to be actionable, an action must constitute a tangible employment action; that is, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001) (a negative performance evaluation, absent tangible job consequences, is not an adverse action).

the time the decision was made, why did Grand Truck Western remove Mr. Hart from service and subsequently issue a 26-day time served suspension? If this decision was made, even in part, because Mr. Hart filed a written safety complaint, then Grant Truck Western violated the FRSA and Mr. Hart may be entitled to relief. If not, then Mr. Hart may have a claim, just not under the FRSA. As discussed below, I find the latter.

Contributing Factor Analysis¹⁰

To establish causation, Complainant need only show that his reporting of a hazardous safety condition was a contributing factor in the unfavorable personnel action, “not a substantial, significant or even predominant one.” *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). In other words, whether or not the protected activity is a “contributing factor” in a FRSA whistleblower case is not a demanding standard. A “contributing factor” means “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of a decision.” *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989)). Complainant is not required to prove that his protected activity was the only or the most significant reason for any adverse action taken against him; rather, Complainant must establish that the protected activity affected in any way the adverse action taken, notwithstanding other factors an employer cites in defense of its action. *DeFrancesco v. Union Railroad Company*, ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015). Furthermore, Complainant need not demonstrate the existence of a retaliatory motive on the part of Respondent in order to establish causation under FRSA. *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). Neither motive nor animus is required as long as the protected activity contributed in any way to the adverse action. *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014).

A “chain of events” may substantiate a finding of contributory factor; however, more than a temporal connection between the protected conduct and the adverse employment action is required in order to do so. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014); *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014). A chain of events is likely to be sufficient evidence where the adverse action would not have taken place but for the protected activity, or where the protected activity set in motion the subsequent investigation and disciplinary process. See *DeFrancesco*, ARB No. 13-057 (finding that if the complainant had not reported his injury, the company would not have conducted the investigation that resulted in the discipline); *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013) (concluding that if the complainant had not reported his injury, he would never have been required to comply with the provisions of the return-to-work-programs created by the employer to address work-place injury); *Ray v. Union Pacific R.R. Co.*, F.Supp.2d 869 (D. Iowa 2013) (“If [Complainant] had not reported the alleged work-related injury, [Respondent] would not have undertaken an investigation into either the honesty of [Complainant’s] statement . . . or the timeliness of [his] injury report, and Complainant would not have been terminated.”). Additional evidence of Respondent’s

¹⁰ Before he made the decision to suspend Complainant, Mr. Colasimone was not aware that Complainant had filed a safety hazard report.

knowledge of protected activity, temporal proximity, disparate treatment, and evidence that the company's disciplinary rules effectively punish an employee for being injured may substantiate a finding of contributory factor. *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014).

Complainant asserts that the evidence establishes that his filing of a Safety Hazard Reporting Form on October 11, 2012 was a contributing factor to Respondent's decision to pull him from service on November 15, 2012 and to suspend him from work. Complainant further explains that the evidence demonstrates that Mr. Bistis both had personal knowledge of the Form and made the decision to pull Complainant from service. I disagree on both accounts.

Complainant correctly states that the contributing factor element may be established by direct evidence or indirectly by circumstantial evidence. See *DeFrancesco v. Union Railroad Co.*, ARB Case No. 10-114 (Feb. 29, 2012). However, whether Complainant is attempting to prove its case by direct or circumstantial evidence, he must do so by the preponderance of the evidence in the case. I find that Complainant has failed to meet this burden.

Preponderant evidence does not demonstrate that GTW's decision to remove Mr. Hart from service on November 15, 2012 and impose a 26-day time served suspension on December 10, 2012 was based, even in part, on the October 11, 2012 filing of a Safety Hazard Reporting Form. The record includes one document relating to the Complainant's protected activity: the faxed Safety Hazard Reporting Form, CX 4. Complainant faxed CX 4 to the Battle Creek safety office on October 11, 2012, and the Form appears to be properly addressed to the yard; however, Complainant does not know what happened to it or who saw it once he faxed it in. There is no evidence to suggest that anyone employed by or representing Respondent personally viewed or responded to the Form. I find Mr. Bistis, Mr. Herbeck, Mr. Colosimone and Mr. Osmond credible in their testimony that they had neither seen nor been made aware of CX 4 or that Complainant had submitted such a Form before December 10, 2012. Complainant did not discuss the Form or the contents therein with Mr. Osmond, Mr. Colosimone or Mr. Herbeck, nor is there any evidence to suggest that the Form was discussed at a safety meeting.

I also find Mr. Bistis credible when he testified he was not aware that Complainant had filed a Safety Hazard Reporting Form and did not recall specifics regarding hazardous conditions in the Battle Creek yard at time he removed Complainant from service. In other words, even if Complaint had mentioned to Mr. Bistis in passing that that the fuel dock in Battle Creek had tall weeds presenting a safety issue, Complainant did not relate it to the October 11, 2012 Form and Mr. Bistis did not remember any such conversation, assuming it even took place before the decision to remove Mr. Hart from service. I therefore find that Respondent did not have knowledge of Complainant's protected activity.¹¹

¹¹ While there is no evidence of animus or a retaliatory motive, as noted, animus is not required at the contributing factor stage. Respondent cites to *Kuduk* in support of its argument that motive is now relevant to a contributing factor analysis and Complainant cannot show a retaliatory motive in the disqualification. Respondent takes a rather expansive reading of *Kuduk*. The *Kuduk* Court found that "contributing factor" causation does not require that the employee conclusively demonstrate the employer's retaliatory motive in making his prima facie case. 768 F.3d 786 at 791. Instead, the employee must prove intentional retaliation prompted by the employee engaging in protected

Furthermore, even if I were to assume that Respondent did have knowledge of Complainant's protected activity, there is no evidence connecting the protected activity to the decision to remove Mr. Hart from service and issue a time-served suspension. Complainant does not automatically establish a causal nexus simply by demonstrating his employer took an unfavorable personnel action after his report of a hazardous safety condition. The evidence fails to establish that Complainant's filing of the Safety Hazard Reporting Form set in motion the chain of events eventually resulting in the adverse employment action. Neither Mr. Osmond nor Mr. Herbeck knew Complainant before they carried out the November 14, 2012 efficiency testing or knew that he was scheduled to work on November 14-15, 2012. None of the witnesses who were in the decision-making chain were aware that Complainant had previously faxed the Form at the time the efficiency testing was scheduled or at the time the discipline was imposed. Complainant also did not raise any safety concerns with Mr. Osmond, Mr. Herbeck, or Mr. Colosomine before they carried out the efficiency testing on Complainant's crew. In fact, there is no evidence to suggest that the efficiency testing process was triggered by a safety complaint, much less Mr. Hart's safety complaint.¹² Simply put, I find the protected activity was not a contributing factor because there is no causal link between Complainant's filing of the Safety Hazard Reporting Form and the efficiency testing or the discipline that followed.

In the absence of evidence connecting the protected activity to the adverse action, Complainant is not entitled to FRSA relief even if Respondent inaccurately concluded that Complainant's actions merited discipline. *See Allen v. City of Pocahontas*, 340 F.3d 551, 558 n. 6 (8th Cir. 2003) ("it is not unlawful for a company to make employment decisions based upon erroneous information and evaluations"), *cert. denied*, 540 U.S. 1182 (2004). Complainant presented detailed testimony regarding the events of November 14, 2012. There were allegations of multiple rules violations committed by each of three-member crew on November 14-15, 2012, some more serious than others, and Mr. Bistis's decision to remove Mr. Hart from service on November 15, 2012 was based on a totality of the entire crew's conduct. Whether or not Mr. Bistis's decision was in error, Complainant failed to present evidence relating this decision to the Safety Hazard Reporting Form.

The Federal Railway Safety Act protects employees who engage in protected activities from suffering adverse personnel actions. The FRSA does not protect employees from poor personnel decisions based on faulty or inaccurate information.¹³ While Complainant asserts that there is no credible basis for finding that he was lawfully pulled from service for his efficiency testing results, this argument alone does not create a causal link between his protected activity and the adverse employment action he suffered. The issue before me is not whether Complainant actually violated GTW's operating rules, but whether Complainant was retaliated against for filing a written safety complaint on October 11, 2012. Although Complainant did

activity. *Id*; *see also Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014).

¹² Complainant has also verbally raised safety issues and concerns with Mr. Bistis since October 15, 2012 and has not been disciplined. Since November, 2012, Complainant raised safety concerns both orally and in writing and has had not been disciplined or suffered any adverse consequences. (Tr. 97). There is no Grand Truck Western corporate policy, implicitly or explicitly, prohibiting written safety complaints.

¹³ *See Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013); *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012) (The [FRSA] does not forbid sloppy, mistaken, or unfair terminations; it forbids retaliatory ones.”).

suffer an adverse employment action when he was removed from service and ultimately suspended for 10 days, his “protected activity” (having reported in good faith a hazardous safety condition) was not a contributing factor to it. Therefore, while Mr. Hart may have a cause of action against Respondent, a retaliation claim under the FRSA is not one of them.

Based on the foregoing, I find that Respondent was not aware of the Complainant’s protected activity. I further find, based on the record, that the evidence does not demonstrate that Respondent’s decision to pull Complainant from service on November 15, 2012 and to suspend him from work was based, even in part, on Complainant’s filing of a Safety Hazard Reporting Form on October 11, 2012. As such, Complainant has failed to establish that his protected activity was a contributing factor to the adverse action as required by FRSA.

Conclusion

Complainant has established that he engaged in protected activity by filing a written Safety Hazard Reporting Form, and that he experienced an adverse action. However, he has not demonstrated by a preponderance of the evidence that his protected activity was a contributing factor because none of the decision makers were aware of Complainant’s protected activity at the time the adverse actions were imposed.¹⁴ Respondent is therefore not liable under FRSA.

ORDER

Complainant has failed to establish the required elements of his claim. Accordingly, it is hereby **ORDERED** that the claim and relief sought is **DENIED**.

SO ORDERED.

STEPHEN R. HENLEY
Administrative Law Judge

¹⁴ Given Complainant’s failure to prove the essential elements of his claim, I need not decide whether Respondent has proven by clear and convincing evidence that it would have taken the same adverse action regardless of the protected activity.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).